

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

State of Oklahoma,)	
)	
)	
Plaintiff,)	
)	
vs.)	Case No. 4:05-cv-00329-GKF-PJC
)	
Tyson Foods, Inc., et al.,)	
)	
Defendants.)	
)	

**DEFENDANTS CARGILL, INC. AND CARGILL TURKEY
PRODUCTION, LLC'S MEMORANDUM IN OPPOSITION TO
PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT (DKT. NO. 2062)**

TABLE OF CONTENTS

Response to Plaintiffs’ Statement of “Undisputed Facts”	1
Argument	12
A. The State is Not Entitled to Summary Judgment on Any Aspects Of Its CERCLA Claims Against the Cargill Defendants	12
1. Phosphorus compounds contained in poultry waste are not “hazardous substances”	12
2. The State has not identified proper “facilities” under CERCLA	13
3. Cargill and CTP hav established as a matter of law that the CERCLA fertilizer exemption barts Plaintiffs’ claims	15
B. The State Is Not Entitled to Summary Judgment on its RCRA Claims	15
1. Turkey litter land-applied as fertilizer is not a solid waste within the meaning of 42 U.S.C. § 6903(27)	15
2. Plaintiffs are not entitled to partial summary judgment holding that Cargill or CTP contributed or are contributing to the handling or Disposal of poultry waste in the IRW	15
3. Plaintiffs are not entitled to partial summary judgment of the issue of whether the land application of turkey litter by Cargill Growers “may present” an imminent and substantial endangerment to the environment in the IRW	17
C. The State is not entitled to summary judgment on aspects of its claims against Cargill and CTP for state or federal nuisance, trespass, or violation of 27A Okla. Stat. § 2-6-105	19
1. Plaintiffs fail to demonstrate entitlement to summary judgment under Restatement (Second) of Torts § 427B.....	19
2. Plaintiffs fail to demonstrate as a matter of undisputed fact that the land application of turkey litter by Cargill growers is causing a “significant threat” of injury to the State’s natural resources	23
3. Plaintiffs are not entitled to partial summary judgment on their claim under 27A Okla. Stat. § 2-6-105	24

4. Plaintiffs are not entitled to partial summary judgment for injunctive relief against Cargill or CTP based on 27A Okla. Stat. § 2-6-105.....24

Conclusion25

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Bronson v. Swensen</i> , 500 F.3d 1099 (10th Cir. 2007).....	25
<i>Cox v. City of Dallas</i> , 256 F.3d 281 (5th Cir. 2001).....	16, 17
<i>Nurad, Inc. v. William E. Hooper & Sons Co.</i> , 966 F.2d 837 (4th Cir. 1992).....	14
<i>Simon v. E. Ky. Welfare Rights Org.</i> , 426 U.S. 26 (1976).....	14
<i>Twyman v. GHK Corp.</i> , 93 P.3d 51 (Okla. App. 2004).....	20
<i>United States v. 150 Acres of Land</i> , 204 F.3d 698 (6th Cir. 2000).....	13
<i>United States v. Aceto Agric. Chems. Corp.</i> , 872 F.2d 1373 (8th Cir. 1989).....	16, 17
<i>United States v. Valentine</i> , 885 F. Supp. 1506 (D. Wyo. 1995).....	17
<i>United States v. Waste Indus., Inc.</i> , 734 F.2d 159 (4th Cir. 1984).....	17
STATUTES	
Fed. R. Civ. P. 56.....	2, 17
Fed. R. Civ. P. 56(c).....	15
42 U.S.C. § 6903(15).....	15
42 U.S.C. § 6903(27).....	15
42 U.S.C. § 6972.....	17
42 U.S.C. § 6973.....	17
42 U.S.C. § 9601(9).....	13
2 Okla. Stat. § 2-18.1, 2.....	7
2 Okla. Stat. § 10-9.5G.....	16
2 Okla. Stat. §§ 10-9.7, 10-9.19a.....	22
2 Okla. Stat. § 10-9.7.....	7, 22
27A Okla. Stat. § 2-6-105.....	7, 19, 24, 25

27A Okla. Stat. § 1-1-201(10).....	21
Okla. Admin. Code § 35:17-5-5.....	7
Okla. Admin. Code § 35:17-5-10.....	7

OTHER AUTHORITIES

3 Fed. Jury Prac. & Instr. § 101.44 (5th ed. 2000).....	5
Restatement (Second) of Torts § 427B.....	19, 20

Plaintiffs’ motion for partial summary judgment presents a microcosm of all that is wrong with Plaintiffs’ case. Plaintiffs perceive a problem that they try to blame on poultry litter, despite the myriad other proven sources of the purported problem and the State’s own support and approval of the land application of poultry litter. Pursuing this fixation, Plaintiffs assert individual claims against individual Defendants based on individual conduct. This is not a bellwether proceeding, a “joint enterprise” claim, a class action, or any other kind of aggregate litigation. It is not a case against “the poultry industry.” It is a group of individual claims.

Yet Plaintiffs now ask the Court to excuse them from having to prove these separate claims. Plaintiffs’ motion makes no attempt to prove the elements of any individual claim against Cargill or CTP. Indeed, Plaintiffs’ *entire* argument does not mention either Cargill or CTP *even once*. (Dkt. No. 2062 at 35-64.) And the expert opinions on which Plaintiffs rest their motion use a total of only *four* Cargill-related samples out of a total of over 10,000 taken in the million-acre IRW. Instead of supporting the claims they have made against Cargill and CTP, Plaintiffs broadly assert a perceived problem arising from poultry litter and ask the Court to assume that everyone connected to poultry litter (except the State itself) is responsible.

In a nutshell, Plaintiffs have not established facts sufficient even to avoid summary judgment against them (see Dkt. No. 2062), much less to obtain partial summary judgment as to *any* of the elements of their claims against Cargill or CTP. The Court should deny their motion.

RESPONSE TO PLAINTIFFS’ STATEMENT OF “UNDISPUTED FACTS”

For purposes of the present motion, the Cargill Defendants do not dispute Plaintiffs’ Statements of Undisputed Fact Nos. 2, 3, 9(e) (as to CTP only), and 10(a), (b), (c) (all as to CTP only). Plaintiffs’ statements 9(a)-(d), 9(g)-(l), 15, and 16 do not relate to issues raised by Plaintiffs against Cargill or CTP in the present motion, and this response does not address them.

Cargill and CTP also join in the responses to set forth in Tyson Foods, Inc.’s Response to Plaintiffs’ Motion for Partial Summary Judgment – Statement of Undisputed Facts (Dkt. No. 2183), with the additions below.¹

Cargill, Inc. does not presently contract with turkey growers in the IRW (Dkt. No. 2079-9), as Plaintiffs have acknowledged. (See Dkt. No. 1373 at 5-6 n.3.) Many of Plaintiffs’ statements of fact, however, assert conduct or conditions *only* in the present tense, making them necessarily inapplicable to Cargill, Inc. Cargill, Inc. therefore disputes the following statements on that basis: 6-8, 9(e), 10 (all subsections), 11-13, 17-26, 28, 31, 34, 36-38, 42-46, 49, 52.

1. Disputed. Cargill Turkey Production, LLC is a Delaware limited liability company, not a corporation or partnership. (Dkt. No. 2139).

8 & 9(e). Disputed. Cargill Inc. has had no poultry operations since June 1, 2004. (Dkt. No. 2079-9). CTP does not “raise their birds themselves”; Contract Growers raise CTP’s birds in the IRW, whether raising preproduction layers or poults in growout houses. Alsup Dep. at 67:20-69:4 & 126:12:15 (Dkt. No. 2079-4).

10. Plaintiffs’ cited sources do not support their assertion that Cargill and CTP “exercise control over all essential aspects of poultry production.”² In addition:

10(d). Disputed. The Cargill Defendants and the growers negotiated delivery dates for

¹ Many of the broad assertions Plaintiffs make in their present motion are in fact either misleading or exaggerated. Because they do not bear on the present motion, however, and because of the limited space available for response, the Cargill Defendants will not address those allegations here. Cargill and CTP reserve the right to dispute these issues at trial.

² Cargill and CTP also object to Plaintiffs’ reliance on Dr. Robert Taylor for their factual assertions. Evidence in support of summary judgment must be admissible, see Fed. R. Civ. P. 56(e)(1), and Dr. Taylor’s report and testimony are inadmissible as detailed in Defendants’ Motion to Exclude the Testimony of Dr. C. Robert Taylor (Dkt. No. 2078). Cargill and CTP dispute the following statements on this ground: 6, 7, 10, 11, 12, 13, 14, 15, 26, and 34.

turkeys. (See Dkt. No. 2079-4 at 79:12-79:9 (Alsup 6/24/08 Dep.); see also Dkt. No. 2079-8 at Exs. 1-5.) As support for their unrestricted assertion, Plaintiffs cite only a single response from a single Cargill Grower about his legal interpretation of his current contract. (Dkt. No. 2066-8.)

10(f). Disputed. CTP only sets minimum standards for poultry houses and equipment. (See Dkt. No. 2079-4 at 23:15-24:3; see also Dkt. No. 2079-8 at Ex. 1 ¶ 3, Ex. 5 ¶ 6, Ex. 10 ¶ 6; Ex. A: Maupin 7/22/08 Dep. at 400:16 – 401:10.)

10(g). Disputed. CTP's crop supervisors regularly visit grower facilities and offer recommendations on growing operations. (Dkt. No. 2079-4 at 36:16 – 37:12.)

10(h). Disputed. CTP does not dictate where growing operations are located, as the very passage Plaintiffs cite shows. (Id. at 58:11 – 59:10.)

10(i). Disputed. CTP does not specify clean-outs and cake-outs of poultry houses. Id. at 52:8-53:15. Plaintiffs' cited source does not state otherwise. (See Dkt. No. 2062 at ¶ I(10)(i); Dkt. No. 2070-1.)

11. Disputed. Cargill and CTP turkey contracts have never been flock-to-flock. Cargill Grower contracts have always been for at least a one-year term. (See Dkt. No. 2079-7 Exs. 1-10.) In addition, Cargill had and CTP has obligations under grower contracts and could not terminate contracts without cause. (See, e.g., Dkt. No. 2079-8 at Ex. 8 ¶ 19 & Ex. 10 ¶ 19.)

12. Disputed. Aspects of Cargill and CTP contracts with contract growers were and are negotiated. (Ex. A at 396:6-15.) Furthermore, growers can and do elect to discontinue their services for one poultry company and contract with another. (See, e.g., Dkt. 1535 at ¶ 8; Ex. B: 5/25/2007 Pigeon Dep. at 15:5 – 16:9; Ex. C: Dec. 15, 2003 Commercial Egg Prod. Agree. with Cal-Maine (CM-00001381-83); Ex. D: June 9, 2005 Fixed Term Turkey Feeding & Mgmt. Agree. with CTP (CARTP003561-68); Ex. A: at 381:15 – 382:3.) Plaintiffs' cited sources do not

state otherwise as to CTP or Cargill.

13. This legal conclusion is disputed based on the disputed facts as set forth above.

14. Disputed. Although Cargill provides the initial brood litter, growers have always been responsible for the cost of the litter for grow-out houses and have always owned the litter. (Dkt. No. 2079-8 Ex. 1 at ¶ 3, Ex. 2 at ¶ 3, Ex. 3 at ¶ 2, Ex. 4 at Schwabe3261 ¶ 2, Ex. 5 at ¶ 7, Ex. 6 at ¶ 7, Ex. 7 at ¶ 7, Ex. 8 at ¶ 7, Ex. 9 at ¶ 7, & Ex. 10 at ¶ 7.) Plaintiffs' cited sources do not state otherwise for Cargill or CTP.

15. Disputed; see Nos. 10-14 above. Plaintiffs cite no evidence as to Cargill or CTP.

17. Disputed. CTP was not a party to the City of Tulsa case or settlement. (Dkt. No. 2070-11: City of Tulsa Consent Decree at 8-9.) Moreover, to the extent the settlement agreement obligated contract growers to act, it would have been pursuant to Court Order or the terms of a new contract with Cargill, Inc. that growers freely entered into. (Id. at 10-11.)

18. Disputed. Plaintiffs' citation does not report the number of houses in the IRW that are actively housing turkeys owned by CTP. Plaintiffs' investigators who conducted field observations to assist Dr. Fisher in computing this figure noted only 23 active poultry operations that they regarded as related to Cargill. (Dkt. No. 2085-6 ¶ 6 (Walker Decl.); Dkt. 2079-14 ¶ 17 (Dolan Decl.); Ex. E: compilation of investigator observation forms.)

19. Disputed. Plaintiffs' cited source addresses only chickens, not the turkeys raised by Cargill and CTP contract growers. (See Dkt. No. 2079-8 at Exs. 1-4, 8, 9 & 10; see also Ex. F: Alsup 6/25/08 Dep. at 269:10 – 272:30.)

20. Disputed. Plaintiffs' cited sources address only chickens, not turkeys.

21. Disputed. Plaintiffs' cited maps do not show that CTP's contract growers are dispersed geographically across the IRW.

22. Disputed. The Cargill Defendants' own estimates for the amount of litter produced in the IRW during similar time periods are significantly less. (See Ex. G: CARTP095366; Ex. H: CARTP121759; Dkt. No. 2079-3 at 149:25-154:7.)

23. Irrelevant. Statement does not allege what if any portion of this phosphorus is claimed to be attributable to land application by Cargill growers.

24. Disputed. See response to paragraph 22 above.

25. Misleading as worded. Turkey litter has multiple beneficial uses, and in particular is an effective and economical source of plant nutrients that can be used to satisfy crop nutrient requirements. (Ex. I: Coale R. at 2; Ex. J: Pls.' Resp. to Cargill Defs.' Feb. 17, 2009 RFA No. 1; Dkt. No. 1552-7 ¶ 8 (Doyle Aff.).)

26. Disputed. Like all phosphorus that occurs in the environment, the turkey litter generated by Cargill's and CTP's contract growers contains phosphorus compounds, not elemental phosphorus or "phosphorus in the form of phosphorus compounds." (Dkt. No. 2095-4: Ginn R. at 8-2; Ex. I: Coale R. at 4-5.)

27. Disputed. See Defs.' Joint Mot. for Summ. J. on Counts 1 & 2 (Dkt. No. 1872).

28. Disputed. Cargill and CTP do not generally know whether their individual contract growers in the IRW land-apply, sell, trade, or otherwise make use of the poultry litter generated by the Cargill Defendants' turkeys but owned by the growers.³ (See Ex. K: Cargill Resp. to Pls.' 03/17/2009 Interrog. & Doc. Reqs. at 3; Ex. L: CTP Resp. to Pls.' 03/17/2009 Interrog. & Doc. Reqs. at 3.)

³ As to Plaintiffs' reliance on Ex. 61 in support of this paragraph, Cargill and CTP note that an attorney's opening statement is not evidence, e.g., 3 Fed. Jury Prac. & Instr. § 101.44 (5th ed. 2000), and that the quoted statement was not made on behalf of Cargill or CTP in any event.

29. Disputed. The State of Oklahoma issue permits and authorizations for the land application of poultry litter. (Ex. M: P.I. Hrg. Tr. at 453:11-15: Pls.’ expert Engel noting issuance of plans by State.) Every current CTP grower has a state-drafted and -issued Nutrient Management Plan or Animal Waste Management Plan, including plans issued by Oklahoma since the start of this litigation. (See, e.g., Ex. N: Schwabe4390–422 (Apr. 2004 Schwabe NMP), Ex. O: 2009 Cargill supp-0051–97 (6/07 Fisher NMP); Ex. P: 2009 Cargill supp-00168–76 (6/08 Masters NMP); Ex. Q: 2009 Cargill supp-00193-222 (2/07 Mitchell NMP); Dkt. 2079-8 at Ex. 10 ¶ 7.)

30. Disputed. Plaintiffs’ cited sources do not address the proportions of CTP turkey litter used inside and outside the IRW, and Plaintiffs’ expert on this issue, Dr. Fisher, did not perform a Defendant-specific analysis. (Dkt. 2088 at ¶ 5.) In fact, the cited pages in Dr. Fisher’s report do not include data from any Cargill Growers in the IRW. (Defendants’ Response to State of Oklahoma’s Motion in Limine to Preclude Expert Testimony of Defendants’ Witness Billy Clay, Ex. P: Fisher R. at 8, n.4.) Since October 2005, almost all turkey litter from CTP’s breeder farms has been hauled off the farms, and has been hauled out of the IRW since the spring of 2007. (Ex. R: CTP Supp. Resp. to Pl.’s 09/13/2007 Interrog., Interrog. No. 6, at p. 5.) Plaintiffs’ own investigators saw litter being hauled out of the IRW but did not quantify it. (Dkt. No. 2085-17 Ex. 11 at 111:23 – 112:14 (Steele Dep.).)

31. Disputed. Plaintiffs’ cited sources offer no evidence that the majority of turkey litter from Cargill contract growers that is land-applied is applied between February and June.

32. Misleading as worded. It is unclear what Plaintiffs mean by referring to the amount of “poultry waste” as “significant.” Likewise, Plaintiffs reference to “poultry waste” is misleading as poultry material used as fertilizer is not “waste” but is in fact a useful and

beneficial material. See ¶ 25 above.

33. Disputed. Nothing in Exhibit 71 relates any of the highlighted square-mile sections to either Cargill or CTP. Moreover, Plaintiffs' map alleges only that litter has been applied *somewhere* on a particular square mile, not that it has been applied on the entire location.

34. Disputed, based on the responses to Paragraphs ¶¶ 10(h), 18, 19, 20, 21, and 30.

36. Disputed. Poultry waste is a good fertilizer or soil conditioner. (Ex. J: Pls.' Resp. to RFA No. 1; Ex. A at 139:24 – 140:5; Ex I: Coale R. at 2-3; Ex. S: Clay R. at 7-8.)

37. Disputed. STP level is not always the dominant factor in determining agronomic benefits; economic reasonableness, best management practices, protection of the environment, and other nutrient needs also weigh heavily. (Ex. T: Coale Dep. at 39:25 – 40:1; 186:10 – 187:5)

38. Disputed. See Response to Paragraph 37 above.

39. Disputed. Nothing in Plaintiffs' cited sources suggests that any turkey litter from any Cargill contract grower has been over-applied in the IRW.

40. & 41. Disputed. Although the Cargill Defendants do not track contract grower use of turkey litter in the normal course of business, information developed in the course of Cargill's and CTP's defense against Plaintiffs' claims has shown that those Cargill Growers who land-apply turkey litter as fertilizer do so consistent with AWP's and NWMP's, that is, normally. Neither Cargill, nor CTP, nor any Cargill or CTP Grower has ever been fined or assigned violation points pursuant to Okla. Admin. Code § 35:17-5-10 by ODAFF for a violation of 27A Okla. Stat. § 2-6-105, 2 Okla. Stat. § 2-18.1, 2 Okla. Stat. § 10-9.7, or Okla. Admin. Code § 35:17-5-5. (Dkt. No. 2079-14; see Dkt. No. 2079-14 ¶¶ 10-12; see also Dkt. Nos. 2085-3 at 473:8-23 (Fisher 9/4/08 Dep.); 2079-13 at 259:19-25 (Parrish Dep.); 2079-11 at 237:8-15 (Berry Dep.); and 2079-12 at 181:2–182:19 (Littlefield Dep.).) Further, the investigators hired by

Plaintiffs identified only one land application event allegedly on a CTP contract grower farm in their four-year investigation, and neither the document reflecting that observation nor the investigators' testimony about it indicates that this one instance of litter application was abnormal or inconsistent with good litter application practices.⁴ (Dkt. 2085-6 ¶ 18(b).) In fact, Plaintiffs did not attempt to conduct any testing of the material being land applied, calculate the rate of application, or interview the person conducting the land application to determine if this instance of land application was improper. (*Id.*) Plaintiffs' cited sources offer no evidence that any Cargill or CTP grower has ever land-applied poultry litter in other than a normal manner.

42. Disputed. There are multiple sources that lead to elevated phosphorus levels during high and low flow events, including point- and non-point-source discharges from facilities such as waste water treatment plants, compromised septic systems, golf courses, industrialization, and urban development projects, as well as the resuspension of point-source phosphorus previously deposited to the streambed or bottom of impoundments. (Ex. V: Larson R. at 5; Ex. W: Sullivan R. 29-50; Ex. X: Connolly R. at 2-38.) In addition, Plaintiffs' cited sources do not address phosphorus loading from turkey litter.

43. Disputed. Excessive flooding can cause elevated phosphorus loadings during high-flow events stemming from point sources. See Response to Paragraph 42 above.

44. Disputed. Poultry litter is one of multiple sources of phosphates in the watershed,

⁴ The record is ambiguous concerning whether this observation was even made at a grower property ever under contract with a Cargill Defendant. Although the observation note indicates that the property is a "Honeysuckle Turkey Farm," a brand name operated by Cargill, it is identified as the "Good Acres Farms." (See Ex. U: OK-PL-0005008.) No GPS coordinates are provided. (*Id.*) Neither Cargill Defendant is aware that it has ever contracted with a grower doing business as "Good Acres Farms" in the IRW. (See Ex. CC: Cargill Defs.' Supp. Resps. to Interrog. 1.) Plaintiffs' investigators have no independent recollection of the observation. (See Dkt. No. 1085-11 at 123:20-23 (Hummel Dep.); Dkt. No. 2087 at 84:17-20 (Weatherly Dep.).)

and has not been established to be the dominant source. (Dkt. No. 2092-4 (Davis R.) at 5; Ex. Y: Connolly Dep. at 107:5-107:12 (Pls. Ex. 90); *see* Ex. X: Connolly Report, 2-32 - 37.)

46. Disputed. Plaintiffs' cited sources do not support the statement as to the Cargill Defendants, and Plaintiffs made no effort to assess the terrain and geology of Cargill contract grower operations, which vary greatly from one Cargill grower location to another. (Dkt. Nos. 2092-4: Davis R. at 5; Ex. Z: Davis Dep. at 72:15 – 73:9; see also generally Dkt. No. 2095-23 (Davis App. B).) Nor have Plaintiffs attempted to track the actual movement of phosphates from the edge of any Cargill Grower field where poultry litter has been applied to any stream in the IRW. (Dkt. No. 2085-3 at 83:12 – 84:5; Ex. W: Sullivan R. at 115.)

47. Disputed, misleading as worded, and the evidence cited does not support the fact as written, particularly with respect to Cargill and CTP. Cargill and CTP understand that Oklahoma and Arkansas have passed laws and regulations regarding litter management, and the government-approved plans mandated by those laws are intended to protect water quality. (Dkt. No. 2079-4 at 186:1-11.) The State has no evidence that any such risk has resulted in any release of nutrients from any Cargill, CTP, or one of their contract grower's farms. (Dkt. No. 2079.)

48. Disputed. Plaintiffs' cited sources do not suggest that turkey litter land-applied by any Cargill or CTP contract grower has run off or leached into the waters of the IRW. Plaintiffs' own investigators found no evidence of runoff or leaching at Cargill grower sites. (See Dkt. No. 2079 Exs. E & K (*passim*); see also Davis R. at Dkt. 2092-4.)

48(c). Disputed. Plaintiffs' own inspectors identified no evidence of runoff as to Cargill grower. (Dkt. Nos. 2079-7 & 2079-14 (*passim*).) Plaintiffs have identified no evidence that runoff from any Cargill-related field has caused damage to the waters of the IRW. (Dkt. Nos. 2085-3 at 83:12–84:5; 2079-12 at 182:8-19; 2085-4 at 21:22–22:25; 2085-5 at 55:23–56:21.)

The environmental BMP Plaintiffs cite (Dkt. No. 2103-4: Ex. 110 at CARTP000009) does not support the proposition for which Plaintiffs cite it, nor does it constitute an admission by Cargill. Plaintiffs well know that Cargill did not author the statements on CARTP000009, but rather, that Tim Maupin compiled information from a number of other sources while at a previous employer for the purpose of disseminating educational information to contract growers to help them with a variety of practices, including nutrient management, litter storage, litter calibration, turkey disease control, and insect control. (Dkt. No. 2079-5 at 168:6-18 (Maupin 5/15/08 Dep., discussing earlier version of document containing same information reflected on CARTP000009.) After Mr. Maupin began working for Cargill, he disseminated a similar guide to Cargill's contract growers with the goal of informing contract growers of best management practice regarding litter. (Id. at 181:25–182:18.) Mr. Maupin did not endorse any specific statement in the guide nor did he make any attempt to edit those statements. (Id. at 169:1-20.) Contrary to Plaintiffs' assertions, Cargill's statements are limited to the one-page Grower Environmental Policy, which is separate and distinct from the guide. (Dkt. No. 2103-4: Pls.' Ex. 110 at CARTP000005; Dkt. No. 2079-5 at 177:23–178:15: Maupin 5/15/08 Dep.) That policy states that Cargill's contract growers must use proper litter storage practices, and by January 1, 2004, have in place or have applied for site specific nutrient management plans. (Id.) In addition to Cargill's long-standing requirement that its growers comply with law, Cargill and CTP integrated the Grower Environmental Policy into their contracts by specifically requiring all contract growers to obtain nutrient management plans that are approved by the proper governmental authorities. (Dkt. No. 2079-8 at Exs. 9 & 10.) Cargill's understanding is that these government-approved plans are intended to protect water quality. (Dkt. No. 2079-4 at 186:1-11: Alsup 6/24/08 Dep.) Cargill looks to the government and scientists to identify risks to

the environment and provide regulatory guidance on how to address those risks. (Ex. AA: Willardsen 5/22/08 Dep. at 203:7 – 204:15.)

The Poultry Water Quality Handbook Plaintiffs cite (Dkt. No. 2077-2 Ex. 56) does not support the statement for which Plaintiffs cite it. In any event, it is not a Cargill statement or admission; the document is originally from the Water Quality Consortium document. Cargill merely distributed to growers as a courtesy for guidance. (See Dkt. 2077-2 Ex. 56.)

In addition, Dr. Connolly was shown multiple articles during his deposition and testified he had not relied upon or sometimes even read the studies in connection with forming his opinions; because he was shown many of these studies for the first time at his deposition, he explained that he could not confirm or deny the presented findings. (See Ex. Y: Connolly 4/9/09 Dep. at 169:15–173:2.) Dr. Davis’s analysis of all relevant environmental sample data on which Plaintiffs and their experts rely detects no evidence that phosphorus runs off or has run off fields involved in Cargill Grower operations. (Dkt. No. 2092-4: Davis R. at 4-5; Ex. Z: Davis Dep. at 104:24 – 105:6; 155:2 – 156:6.)

49. Disputed. Plaintiffs’ cited sources do not suggest that phosphorus levels are “very high” in proximity to any application of turkey litter by any Cargill Grower. (See Dkt. No. 2092-4: Davis R. at ES-1.)

50. Disputed. Plaintiffs’ cited sources do not support the statement as to locations near or operations of Cargill Grower sites. (See Dkt. No. 2092-4: Davis R. at ES-1, 4-5; Dkt. No. 2095-4: Ginn R. at 5-48, 5-51.)

51. Disputed, misstates cited testimony. In response to a general hypothetical question, Dr. Ginn testified that he believes “the DOI rule specifies that an exceedance of a state standard would be a defined injury in the injury determination phase.” He explained that

although violation of a water quality standard could reflect an injury to a resource in the injury determination phase under the DOI rule, it simply suggests that further study is warranted to determine whether there is an injury in fact. Further, in the injury quantification phase, the rule specifies that any injury should be “quantified in time and space relative to baseline conditions, based on effects at the [biological] population, the habitat, or the ecosystem level, and defined as a loss of services for that particular resource.” (Ex. BB: Ginn Dep. at 36:25–37:7; 38:6–39:11)

52. Disputed. See Response to Paragraph 51 above.

53. Disputed, for the reasons stated for Paragraph 48 above. Further, according to the Cargill Defendants’ expert Dr. Brian Murphy’s analysis of the relevant environmental sample data collected by Plaintiffs, Plaintiffs’ samples show no evidence of a poultry litter signature from turkey litter from Cargill grower operations in the waters or sediments of the IRW. (Dkt. No. 2089: Murphy R. at 9, 30-33.)

54. Disputed, for the reasons stated in response to the paragraphs Plaintiffs cite.

55. Disputed, for the reasons stated in response to the paragraphs Plaintiffs cite.

ARGUMENT

The Court should deny Plaintiffs’ motion for partial summary judgment as to elements of their claims. In fact, as argued elsewhere, the Cargill Defendants are themselves entitled to summary judgment as to all of Plaintiffs’ claims. (See, e.g., Dkt. Nos. 1872, 2079.)

A. The State Is Not Entitled to Summary Judgment on Any Aspects of Its CERCLA Claims Against the Cargill Defendants.

1. Phosphorus compounds contained in poultry waste are not “hazardous substances”

For the Cargill Defendants’ response, please see Defendants’ Joint Motion for Summary

Judgment on Counts 1 and 2 (Dkt. No. 1872).⁵

2. The State has not identified proper “facilities” under CERCLA.

For the Cargill Defendants’ response, please see Defendants’ Joint Motion for Summary Judgment on Counts 1 and 2 (Dkt. No. 1872). In addition, Plaintiffs have not provided any evidence that would permit the Court addressing the factual allegations in this case to hold that “the locations where poultry waste has been land applied and come to be located” are “facilities” under CERCLA. CERCLA of course *defines* a “facility” as “any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located.” 42 U.S.C. § 9601(9). Even assuming *arguendo* that poultry litter were a “hazardous substance,” however, Plaintiffs’ motion does not identify a single “facility” (other than the IRW as a whole) that fits the statutory definition. Neither Plaintiffs’ present motion (Dkt. No. 2062) nor the earlier submissions that it incorporates (Dkt. Nos. 1913, 1919) identifies a single specific farm or field that Plaintiffs claim constitutes a CERCLA facility or defines the boundaries of such a facility. (See also Ex. J at 10-11: Pls.’ Resps. to Cargill’s 2/17/9 Reqs., failing to provide “locations and boundaries” of claimed Cargill-related facilities from which purported “release” had occurred.) Plaintiffs cannot expect the Court to reach “facility” holdings as a matter of law when Plaintiffs have not even told the Court where those “facilities” are. Cf. United States v. 150 Acres of Land, 204 F.3d 698, 708 (6th Cir. 2000) (looking to collective history of parcels to determine whether they constitute a single “facility”).

Moreover, although Plaintiffs offer evidence that poultry litter has been applied in the

⁵ In addition, as to Plaintiffs’ first two CERCLA arguments (Dkt. No. 2079 at 36-38), Plaintiffs’ reliance in their motion on what they themselves characterize as “Disputed Facts” (see Dkt. No. 2062 ¶¶ 27, 41, 53 and at 36, 37) undercuts any claim of entitlement to summary judgment. See Fed. R. Civ. P. 56(c) (summary judgment requires “no genuine issue of material fact”).

IRW generally, Plaintiffs' moving papers identify no evidence that any poultry litter has *actually* come to be located at *any* particular farm site, much less at any site for which Plaintiffs may seek to hold Cargill or CTP liable.⁶ Plaintiffs cannot seek partial summary judgment against Cargill or CTP on the "facility" issue as to locations for which Plaintiffs do not allege one of the Cargill Defendants is responsible; there is no justiciable controversy between the parties as to such sites, and Plaintiffs lack standing. See, e.g., Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 41 (1976) ("a federal court act only to redress injury that fairly can be traced to the challenged action of the defendant"). Thus, unless and until Plaintiffs identify and define a particular location and make some colorable allegation that Cargill or CTP is responsible for the application of turkey litter at that location, Plaintiffs have no standing to seek partial summary judgment against the Cargill Defendants on the "facility" issue.

In essence, Plaintiffs ask the Court for a tautological ruling that any theoretical location that meets the CERCLA definition of "facility" constitutes a "facility" under CERCLA. Plaintiffs cite no evidence that any specific location (other than the IRW as a whole) fits the statutory definition, and Plaintiffs' motion for partial summary judgment on the "facility" issue as to individual farms fails for lack of proof.

⁶ The single page of Plaintiffs' submissions that even approaches an offer of such proof is a map that purports to show mile square "sections" of the IRW to which poultry litter has been applied. (Dkt. No. 2088-6 at 27.) This map cannot define Plaintiffs' purported Cargill-related "facilities," however, for at least three reasons. First, these square-mile "sections" do not match the "facilities" that Plaintiffs allege in their pleadings. (See SAC ¶ 71, alleging "facilities" are the entire IRW and "the grower buildings, structures, installations and equipment, as well as the land to which the poultry waste has been applied".) Second, Plaintiffs' map alleges only that litter has been applied *somewhere* on the square mile, not that it has "come to be located" on the *entire* square mile. Third, nothing in Plaintiffs' submissions links any of these specific "sections" to either Cargill or CTP. See Nurad, Inc. v. William E. Hooper & Sons Co., 966 F.2d 837, 843 (4th Cir. 1992) (limiting scope of "facility" as to defendant to area where defendant had actual control).

3. Cargill and CTP have established as a matter of law that the CERCLA fertilizer exemption bars Plaintiffs' claims.

For response, please see Defendants' Joint Motion for Summary Judgment on Counts 1 and 2 (Dkt. No. 1872) and the Cargill Defendants' memorandum in support of summary judgment (Dkt. No. 2079 at 10). Again, Plaintiffs' reliance on their self-characterized "Disputed Facts" (Dkt. No. 2062, citing Dkt. No. 1913, "Disputed Material Facts ¶¶ 10-18"), undercuts any claim of entitlement to summary judgment on this issue. See Fed. R. Civ. P. 56(c).

B. The State Is Not Entitled to Summary Judgment on its RCRA Claims.

Plaintiffs have not established entitlement to partial summary judgment against the Cargill Defendants as to the substantial aspects of RCRA raised in their motion.⁷ On the contrary, as set forth elsewhere, the Cargill Defendants are in fact entitled to summary judgment themselves on Plaintiffs' RCRA claims against them. (See Dkt. Nos. 2050, 2079.)

1. Turkey litter land-applied as fertilizer is not a solid waste within the meaning of 42 U.S.C. § 6903(27).

The Cargill Defendants join in the Defendants' joint response to this argument in Defendant Tyson Poultry, Inc.'s Opposition to Plaintiffs' Motion for Partial Summary Judgment with Regard to Plaintiffs' Claims Under CERCLA and RCRA (Dkt. No. 2062). In addition, Plaintiffs have cited no specific facts suggesting whether or how any Cargill Defendant or Cargill contract grower has "discarded" turkey litter in a manner to bring it within 42 U.S.C. § 6903(27). Plaintiffs' motion thus fails both as a matter of law and for lack of proof.

2. Plaintiffs are not entitled to partial summary judgment holding that Cargill or CTP contributed or are contributing to the handling or disposal of poultry waste in the IRW.

⁷ The Cargill Defendants do not dispute that they are "persons" within the meaning of 42 U.S.C. § 6903(15). See Dkt. No. 2062 at 38.

The Cargill Defendants join in Tyson Poultry’s response to this argument in Dkt. No. 2062. The Cargill Defendants also incorporate their discussion of this issue in the Defendants Cargill, Inc. and Cargill Turkey Production, LLC’s Memorandum in Support of Motion for Summary Judgment (Dkt. No 2079 at 12). In addition:

Although Plaintiffs make a number of vague and general assertions about the conduct of “Defendants” (Dkt. No. 2062 at 46-47), Plaintiffs point to no specific facts suggesting that these assertions are true as to either Cargill Defendant. In particular, Plaintiffs cite no evidence that Cargill or CTP engaged in any conduct of the type described in the sources Plaintiffs cite, that is, that Cargill or CTP committed “[n]egligent oversight of disposal,” Cox v. City of Dallas, 256 F.3d 281, 296 (5th Cir. 2001), “had authority to control ... any waste disposal,” United States v. Aceto Agric. Chems. Corp., 872 F.2d 1373, 1383 (8th Cir. 1989), or “generated hazardous waste,” S. Rep. No. 96-172 (1980).

In fact, considerable evidence demonstrates that the Cargill Defendants had no role in producing the claimed “endangerment.” As set out in more detail in Defendants Cargill, Inc. and Cargill Turkey Production, LLC’s Memorandum in Support of Motion for Summary Judgment (Dkt. No. 2079 at 16-21), Cargill did not and CTP does not manage, direct, or conduct operations concerning poultry litter or its application, sale, or transport by contract growers. Nothing in any of the Cargill Defendants’ contracts with Growers gave Cargill or CTP either the right to influence or the responsibility to control any individual Grower’s disposition of that Grower’s turkey litter. (Dkt. No. 2079-7 Exs. 1-10.) It is undisputed that in practice, the Cargill Growers owned the turkey litter and had complete discretion about whether and how to apply it. (Dkt. No. 2079-5: Maupin Dep. at 146:18-25, 147:13-19; 2079-6: Dkt. No. 2079-6: Schwabe Dep. at 32:6-22; Gunter Dep. at 155:17–157:1; Dkt. 2033-24); see also 2 Okla. Stat. § 10-9.5.G.

In sum, whatever legal standard the Court applies, the record evidence establishes at the very least genuine issues of material fact as to whether Cargill was or CTP is a “contributor” under 42 U.S.C. § 6972. Notably, none of the cases Plaintiffs cite in support of their motion held as a matter of law that a defendant was a “contributor,” as Plaintiffs urge here; in every case, the court treated the question as one of fact. See Cox v. City of Dallas, 256 F.3d 281, 288 (5th Cir. 2001) (affirming grant of injunction following bench trial); United States v. Aceto Agric. Chems. Corp., 872 F.2d 1373, 1384 (8th Cir. 1989) (holding plaintiffs sufficiently pled that defendants “contributed to” contamination and remanding for further proceedings); United States v. Waste Indus., Inc., 734 F.2d 159, 168 (4th Cir. 1984) (same).⁸ Indeed, Plaintiffs cite no case in which a Plaintiff has demonstrated *as a matter of law* that a defendant is a “contributor” under section 6972. Given the weaknesses in Plaintiffs’ evidentiary and expert proof and the competing facts set forth above, Plaintiffs here have not met their high summary judgment burden, and the Court should deny their motion as to the Cargill Defendants. See Fed. R. Civ. P. 56.

3. Plaintiffs are not entitled to partial summary judgment of the issue of whether the land application of turkey litter by Cargill Growers “may present” an imminent and substantial endangerment to the environment in the IRW.

The Cargill Defendants join in Tyson Poultry’s response to this argument in Dkt. No. 2184. The Cargill Defendants also incorporate their discussion of this issue in Defendants Cargill, Inc. and Cargill Turkey Production, LLC’s Memorandum in Support of Motion for Summary Judgment (Dkt. No 2079 at 12). In addition:

Again, Plaintiffs’ motion recites a number of vague and general assertions about the

⁸ The remaining case on which Plaintiffs rely is not a § 6972 “contributor” case at all, but a case addressing a defendant’s status as a “generator” and “transporter” under 42 U.S.C. § 6973. See United States v. Valentine, 885 F. Supp. 1506, 1514 (D. Wyo. 1995)

conduct of “Defendants” (Dkt. No. 2062 at 50-51), but Plaintiffs point to no specific facts suggesting whether or how these assertions relate to the Cargill Defendants. As to Cargill, Inc, which Plaintiffs concede has not even participated in the poultry market in the IRW since 2004, Plaintiffs offer no evidence from which the Court could conclude that any five-(plus)-year-old application of turkey litter arguably attributable to any Cargill, Inc. contract grower could possibly result in a present “substantial endangerment” to the environment. As to CTP, Plaintiffs’ motion glosses over the absence of any proof as to CTP with respect to many of the numbered paragraphs of Plaintiffs’ “aggregate” allegations against Defendants. In particular, Plaintiffs offer no evidence that “enormous quantities” of CTP-related turkey litter are applied in the IRW, that most CTP litter is applied during a limited period, that any CTP Grower has over-applied turkey litter to any field, that the terrain near any CTP grower applications is unusually susceptible to pollution, that phosphorus can or does have a pathway from any CTP Grower field to the waters of the IRW, that phosphorus has run off any CTP grower field to which turkey litter has been applied, that CTP-related turkey litter is “the dominant source” of phosphorus in the IRW, that CTP Growers were a factor in any listings of IRW waters as impaired, or that any high phosphorus levels or environmental risks are attributable to CTP growers’ land application of turkey litter. See Responses to “Statements of Undisputed Fact” Nos. 9, 22-24, 26, 28, 30-33, 39, 42-44, 46, 48-51, 52, above.

On the contrary, Plaintiffs’ collected data does not demonstrate fate and transport of phosphates from any Cargill location to the waters of the IRW. (Dkt. No. 2092-4: Davis R. at 5.) Dr. Andy Davis analyzed all of the relevant environmental data Plaintiffs to identify any affirmative evidence of an environmental impact originating from any specific Cargill grower location and concluded there is none. (Id. at 8-43.) First, Plaintiffs have failed to quantify other

anthropogenic and natural sources of phosphorous compounds found in the IRW in proximity to Cargill locations. (*Id.* at 5.) Second, the data collected by the State was not “collected adequately, in a systematic manner, to convey the spatial and temporal variations in the ... IRW. Given the methodology employed by the State, the sampling locations and time of sample collection cannot and do not demonstrate a causal connection between the samples and the Cargill locations.” (*Id.*) Finally, Plaintiffs have failed to account for the diversity and variability of the terrain and drainage pathways at the Cargill grower locations, which must be factored into any fate-and-transport analysis. (*Id.* at 5 & Appendix B.)

In sum, the facts Plaintiffs have offered no evidence demonstrating that any turkey litter land-applied by any Cargill grower “may present” an imminent and substantial endangerment to the environment, and the Cargill-specific evidence in the record demonstrates just the opposite. The Court should deny Plaintiffs’ motion for partial summary judgment on this ground.

C. The State is not entitled to summary judgment on aspects of its claims against Cargill and CTP for state or federal nuisance, trespass, or violation of 27A Okla. Stat. § 2-6-105.

The Cargill Defendants join in the Defendants’ joint response to Plaintiffs’ argument relying on Restatement (Second) of Torts § 427B in Defendant Cobb-Vantress, Inc.’s Opposition to Plaintiffs’ Motion for Partial Summary Judgment With Regard to Plaintiffs’ State Law and Federal Common Law Claims (Dkt. No. 2185). The Cargill Defendants also incorporate their discussion of this issue in Defendants Cargill, Inc. and Cargill Turkey Production, LLC’s Memorandum in Support of Motion for Summary Judgment (Dkt. No. 2079). In addition:

1. Plaintiffs fail to demonstrate entitlement to summary judgment under Restatement (Second) of Torts § 427B.

Even assuming *arguendo* the applicability of Plaintiffs’ proposed standard for nuisance and trespass, Plaintiffs nevertheless are not entitled to partial summary judgment on the Cargill

Defendants' liability under these theories. Under Restatement (Second) of Torts § 427B, a finding of liability for one employing a contractor logically requires at least three showings:

- a. A specific nuisance or trespass created by the contractor's performance of the contract must have actually *occurred* (or the Court would have no context to evaluate the likelihood and knowledge of the nuisance or trespass or to evaluate damages);
- b. The nuisance or trespass that occurred must be likely to result from the performance of the contract; and
- c. The employer of the contractor must know or have reason to know that the nuisance or trespass that occurred was likely to result from performance of the contract.

See generally Restatement (Second) of Torts § 427B. Here, Plaintiffs have failed to established any of these elements as a matter of law.

First, Plaintiffs have not established that any nuisance or trespass actually took place as a result of any Cargill Grower's land application of poultry litter. According to Plaintiffs, the nuisance / trespass at issue is the movement of excessive amounts of phosphorus into the waters of the IRW through the runoff of poultry litter. As set forth in Defendants Cargill, Inc. and Cargill Turkey Production, LLC's Memorandum in Support of Motion for Summary Judgment (Dkt. No. 2079) and the accompanying reports of Drs. Murphy and Davis (Dkt. Nos. 2089 and 2092-4), however, Plaintiffs have identified *no* instance in which *any* turkey litter from *any* Cargill-related field has *actually* run off into the waters of the IRW. Absent such an actual incident of runoff, the Court has no context in which to evaluate under what circumstances the "creation" of such a nuisance is likely, no basis to determine whether the employer "knew or should have known" of such likelihood, and no ground to find "liability for harm" resulting from such a nuisance. See Twyman v. GHK Corp., 93 P.3d 51, 54 n.4 (Okla. App. 2004) ("Causation is a necessary element in proving ... nuisance actions"). Moreover, Dr. Davis's report

(discussed above) provides a considerable body of evidence that no nuisance actually took place, precluding any argument for summary judgment in favor of Plaintiffs and indeed establishing the Cargill Defendants' own entitlement to summary judgment. (See Dkt. 2079 at 12-15.)

Second, Plaintiffs have offered no evidence even suggesting (much less establishing as a matter of law) that the land application of poultry litter by any Cargill Grower on any particular farm would be likely to result in the runoff of sufficient phosphorus to cause environmental damage and create a nuisance or constitute a trespass. This quantitative element is critical, and is entirely ignored by Plaintiffs. Even Plaintiffs do not allege that the mere *presence* of an atom of phosphorus in a body of water establishes a nuisance; phosphates are, after all, a naturally occurring part of the environment. (Dkt. No. 2095-4: Ginn Rep. at 2-4). It is only when the level of a substance is sufficient to cause "an unreasonable invasion of, interference with and impairment of" the use and enjoyment that a nuisance can be created. (SAC ¶¶ 98, 109); see also 27A Okla. Stat. § 1-1-201(10) (holding statutory violation arises from release of material "in quantities which are or will likely create a nuisance or which render or will likely render the environment harmful or detrimental or injurious to public health, safety or welfare").

Here, Plaintiffs' brief does not even try to demonstrate that phosphorus is "likely" to run off any particular field of any Cargill Defendant or Grower, much less that it is likely to do so in a quantity sufficient to create a cause of action. Indeed, Plaintiffs' own investigators, who viewed multiple Cargill Grower sites, had every opportunity to identify conditions making such runoff "likely," but made no such identifications. Plaintiffs' factual showing is insufficient to establish that a nuisance or trespass is or was "likely" to result from any Cargill Grower's land application of poultry litter, and the Court should deny partial summary judgment on this issue.

Third, Plaintiffs have offered no evidence even suggesting (much less establishing as a

matter of law for summary judgment purposes) that the Cargill Defendants knew or should have known that the land application of poultry litter by any Cargill Grower on any particular farm, at a location and in an amount defined by a State-issued permit, would be likely to result in the runoff of sufficient phosphorus to cause environmental damage and create a nuisance or constitute a trespass. Plaintiffs cite evidence concerning knowledge in the aggregate about the general possibility of such runoff, Dkt. No. 2062 at 55-56, but again fail to tie that knowledge either to a Cargill Defendant or to a Cargill Grower field. Moreover, knowledge of the *possibility* that runoff of phosphorus into waters of the IRW may occur under certain circumstances is far different from knowledge that such runoff is *likely* to occur from a particular field in sufficient quantities to constitute to cause environmental damage or cause a nuisance or trespass. Plaintiffs offer no evidence that the conditions at any of the Cargill growers alerted or should have alerted Cargill or CTP that runoff of that magnitude was “likely.”

Moreover, Plaintiffs motion pointedly omits the substantial evidence that Cargill and CTP *in fact* neither knew nor had reason to know that any Cargill Grower’s land application of turkey litter was “likely” to create a nuisance. The Cargill Defendants knew (1) that each of the Cargill Growers had obtained a State-drafted NMP or AWMP for the application of turkey litter that was specifically designed to minimize any adverse environmental impact from such application (Ex. F at 324:9-15; Dkt. No. 2079-8 at Ex. 10 ¶ 7); (2) that any application of litter in violation of an NMP or AWMP was a violation of state law, e.g., Ark. Code Ann. §§ 15-20-1107, 15-10-1108; 2 Okla. Stat. §§ 10-9.7, 10-9.19a; (3) that the Cargill contracts required growers to comply with state law (Dkt. No. 2079-7 Exs. 1-10); and (4) that no state agency had ever reported to Cargill or CTP that any Cargill grower had ever applied turkey litter in violation of an NMP or AWMP (Dkt. No. 2079-4 at 82:1-13). Plaintiffs thus cannot establish as a matter

of law that either Cargill Defendant “knew or should have known” that the land application of poultry litter by a Cargill grower complying with a State NMP or AWMP was “likely” to result in sufficient runoff of phosphorus to constitute a trespass or create a nuisance. The issue plainly presents a question of fact for the jury, precluding summary judgment.

2. Plaintiffs fail to demonstrate as a matter of undisputed fact that the land application of turkey litter by Cargill growers is causing a “significant threat” of injury to the State’s natural resources.

The Court should deny Plaintiffs’ motion for partial summary judgment against the Cargill Defendants on liability for federal nuisance for several reasons. First, although Plaintiffs’ own statement of federal nuisance notes Plaintiffs must prove that “the defendant is carrying on an activity” that causes or threatens an injury, Plaintiffs make no attempt even to identify, much less prove, any such “activity” in which Cargill or CTP is engaged. Plaintiffs assert that “Defendants are responsible” for contract growers’ land application of poultry litter, but offer neither legal authority for that proposition nor factual support for the allegation as to Cargill or CTP. Dkt. No. 2062 at 59. Plaintiffs have utterly failed to prove this element of their claim.

Second, as with other portions of their motion, Plaintiffs cite to no evidence suggesting that the land application of turkey litter by any Cargill Grower poses a “significant threat” to Oklahoma’s natural resources. Plaintiffs’ claim that *anyone’s* land application of litter poses such a threat is hotly contested, as discussed above and in Tyson Foods, Inc.’s Response to Plaintiffs’ Motion for Summary Judgment (Dkt. No. 2183); Plaintiffs’ claim that *Cargill* growers’ land application poses such a threat is simply unsupported by fact.

Finally, Plaintiffs expressly rest their arguments for partial summary judgment on their federal nuisance claim on their RCRA arguments, asserting that the nuisance standard “is akin to the risk-based RCRA standard” addressed earlier in their brief. (Dkt. No. 2062 at 59.) The two

standards quoted by Plaintiffs, however, lack even a single word in common, and Plaintiffs' motion offers neither decisional authority holding that they are the same nor legal analysis suggesting why. Plaintiffs' *ipse dixit* attempt to piggyback their federal nuisance claim onto their RCRA claim is unsupported in law or fact, and the Court should reject it.

3. Plaintiffs are not entitled to partial summary judgment on their claim under 27A Okla. Stat. § 2-6-105.

Not only are Plaintiffs *not* entitled to partial summary judgment holding that Cargill or CTP has violated 27A Okla. Stat. § 2-6-105, the Cargill Defendants are in fact entitled to partial summary judgment on the ground that Plaintiffs can identify *no* evidence at all that *any* Cargill Defendant or Grower has *ever* placed turkey litter in a location where it is *likely* to run off or cause pollution to the waters of the IRW. The Cargill Defendants' argument on this issue is fully set forth in Defendants Cargill, Inc. and Cargill Turkey Production, LLC's Memorandum in Support of Motion for Summary Judgment (Dkt. No. 2079), and they incorporate it here.

4. Plaintiffs are not entitled to partial summary judgment for injunctive relief against Cargill or CTP based on 27A Okla. Stat. § 2-6-105.

The Court should deny Plaintiffs' motion for partial summary judgment against the Cargill Defendants on liability under 27A Okla. Stat. § 2-6-105 for at least three reasons.

First, Plaintiffs yet again ignore the requirement that they actually prove their individual claims against Cargill and CTP. Again, Plaintiffs cite no evidence that the land application of turkey litter by any Cargill Grower creates "a reasonable probability that the injury sought to be prevented will be done if no injunction is issued" as required under 27A Okla. Stat. § 2-6-105.

Second, as discussed above, even Plaintiffs' claim that *anyone's* land application of litter creates such a "reasonable probability" of injury is hotly contested by the parties' experts. See Tyson Foods, Inc.'s Response to Plaintiffs' Motion for Summary Judgment (Dkt. No. 2183).

Third, Plaintiffs claim entitlement to injunctive relief under 27A Okla. Stat. § 2-6-105 without offering any showing that such an injunction would or could remedy the purported threat on which Plaintiffs base their claim. To have standing to assert a claim, a plaintiff must establish redressability. Bronson v. Swensen, 500 F.3d 1099, 1106 (10th Cir. 2007). Redressability means “a likelihood that the injury-in-fact will be redressed by a favorable decision.” Id. at 1111. Cargill, Inc. has undisputedly been out of the turkey business for five years, and granting a prospective injunction concerning turkey litter could not possibly redress any claimed injury or threatened injury. See full discussion in Defendants Cargill, Inc. and Cargill Turkey Production, LLC’s Memorandum in Support of Motion for Summary Judgment (Dkt. No. 2079 at 10).

As to CTP, as discussed above, nothing in CTP’s contracts with its Growers entitled it to any control of or even influence over what the Growers do with the litter that they own. Regardless of whether Plaintiffs feel they can “attribute” the litter to CTP in some abstract sense, they cannot obtain an injunction against CTP concerning turkey litter unless they can show that such an injunction would actually ameliorate the injury at issue. Here, Plaintiffs have not even tried to make such a showing. The Court should deny Plaintiffs’ motion for partial summary judgment for injunctive relief against Cargill and CTP based on 27A Okla. Stat. § 2-6-105.

CONCLUSION

For the reasons set forth above and in the other responses in which Cargill and CTP join, Cargill and CTP urge the Court to deny Plaintiffs’ motion for partial summary judgment.

Respectfully submitted,

RHODES, HIERONYMUS, JONES,
TUCKER & GABLE, PLLC

By: /s/ Theresa N. Hill

John H. Tucker, OBA #9110

Theresa Noble Hill, OBA #19119

100 W. Fifth St., Ste. 400 (74103-4287)

P.O. Box 21100

Tulsa, Oklahoma 74121-1100

Tel: (918) 582-1173

Fax: (918) 592-3390

FAEGRE & BENSON LLP

By:

Delmar R. Ehrich

Bruce Jones

Krisann Kleibacker Lee

2200 Wells Fargo Center

90 South Seventh Street

Minneapolis, MN 55402-3901

Tel: (612) 766-7000

Fax: (612) 766-1600

Attorneys for Defendants Cargill, Inc. and
Cargill Turkey Production, LLC

CERTIFICATE OF SERVICE

I certify that on the 5th day of June, 2009, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

W. A. Drew Edmondson, Attorney General
Kelly Hunter Burch, Assistant Attorney General

drew_edmondson@oag.state.ok.us
kelly_burch@oag.state.ok.us

Melvin David Riggs
Joseph P. Lennart
Richard T. Garren
Sharon K. Weaver
Robert Allen Nance
Dorothy Sharon Gentry
David P. Page
Riggs Abney Neal Turpen Orbison & Lewis, P.C.

driggs@riggsabney.com
jlennart@riggsabney.com
rgarren@riggsabney.com
sweaver@riggsabney.com
rnance@riggsabney.com
sgentry@riggsabney.com
dpage@riggsabney.com

Louis W. Bullock
Bullock, Bullock and Blakemore, PLLC

lbullock@bullock-blakemore.com

William H. Narwold
Elizabeth C. Ward
Frederick C. Baker
Lee M. Heath
Elizabeth Claire Xidis
Fidelma L Fitzpatrick
Motley Rice LLC

bnarwold@motleyrice.com
lward@motleyrice.com
fbaker@motleyrice.com
lheath@motleyrice.com
cxidis@motleyrice.com
ffitzpatrick@motleyrice.com

COUNSEL FOR PLAINTIFFS

Stephen L. Jantzen
Paula M. Buchwald
Patrick Michael Ryan
Ryan, Whaley & Coldiron, P.C.

sjantzen@ryanwhaley.com
pbuchwald@ryanwhaley.com
pryan@ryanwhaley.com

Mark D. Hopson
Jay Thomas Jorgensen
Timothy K. Webster
Gordon D. Todd
Sidley Austin LLP

mhopson@sidley.com
jjorgensen@sidley.com
twebster@sidley.com
gtodd@sidley.com

L Bryan Burns
Robert W. George

bryan.burs@tyson.com
robert.george@tyson.com

Michael R. Bond
Erin W. Thompson
Dustin R. Darst
Kutack Rock LLP

michael.bond@kutackrock.com
erin.thompson@kutackrock.com
dustin.dartst@kutackrock.com

**COUNSEL FOR TYSON FOODS, INC., TYSON POULTRY, INC., TYSON CHICKEN, INC.;
AND COBB-VANTRESS, INC.**

R. Thomas Lay
Kerr, Irvine, Rhodes & Ables

rtl@kiralaw.com

Jennifer S. Griffin
Lathrop & Gage, L.C.

jgriffin@lathropgage.com

COUNSEL FOR WILLOW BROOK FOODS, INC.

Robert P. Redemann
Lawrence W. Zeringue
David C. Senger
Perrine, McGivern, Redemann, Reid, Berry & Taylor, PLLC

rredemann@pmrlaw.net
lzingue@pmrlaw.net
dsenger@pmrlaw.net

Robert E. Sanders
E. Stephen Williams
Young Williams P.A.

rsanders@youngwilliams.com
steve.williams@youngwilliams.com

COUNSEL FOR CAL-MAINE FOODS, INC. AND CAL-MAINE FARMS, INC.

George W. Owens
Randall E. Rose
The Owens Law Firm, P.C.

gwo@owenslawfirmmpc.com
rer@owenslawfirmmpc.com

James M. Graves
Gary V. Weeks
Woody Bassett
K.C. Dupps Tucker
Bassett Law Firm

jgraves@bassettlawfirm.com
gweeks@bassettlawfirm.com
wbassett@bassettlawfirm.com
kctucker@bassettlawfirm.com

COUNSEL FOR GEORGE'S INC. AND GEORGE'S FARMS, INC.

John R. Elrod
Vicki Bronson
Bruce W. Freeman
P. Joshua Wisley
Conner & Winters, LLLP

jelrod@cwlaw.com
vbronson@cwlaw.com
bfreeman@cwlaw.com
jwisley@cwlaw.com

COUNSEL FOR SIMMONS FOODS, INC.

A. Scott McDaniel
Nicole M. Longwell
Philip D. Hixon
Craig Mirkes
McDaniel, Hixon, Longwell & Acord, PLLC

smcdaniel@mhla-law.com
nlongwell@mhla-law.com
phixon@mhla-law.com
cmirkes@mhla-law.com

Sherry P. Bartley
Mitchell Williams Selig Gates & Woodyard
COUNSEL FOR PETERSON FARMS, INC.

sbartley@mwsgw.com

Michael D. Graves

mgraves@hallestill.com

Dale Kenyon Williams, Jr.

kwilliams@hallestill.com

COUNSEL FOR CERTAIN POULTRY GROWERS

I also hereby certify that I served the attached documents by United States Postal Service, proper postage paid, on the following who are not registered participants of the ECF System:

Thomas C. Green

Sidley Austin Brown & Wood LLP

1501 K Street NW

Washington, DC 20005

**COUNSEL FOR TYSON FOODS,
INC., TYSON POULTRY, INC.,
TYSON CHICKEN, INC.; AND
COBB-VANTRESS, INC.**

s/ Theresa N. Hill